CO-OPERATIVE CENTRAL BANK LTD. (IN RECEIVERSHIP)

v.

MENG KUANG PROPERTIES BHD.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[ORIGINATING SUMMONS NO. S7-31-593-88]
20 APRIL 1990

LAND LAW: *Charge - Guarantee - Default by borrower - Order for sale of charged land - Whether demand made to borrower - Terms of charge - Inconsistency in figures in affidavits of chargee - Effect of - Validity of demand and statutory notice - Demand essential before demand for default interest - National Land Code 1965, Form 16D.*

The plaintiff bankers, CCB, advanced monies to D whereby the defendant, MK, executed a charge in favour of CCB as security for the loan to D. On 9 January 1988, CCB notified MK that D had defaulted in repayment and demanded the sum of approximately RM15 million (the said sum). On 19 January 1988, CCB's solicitors sent a statutory notice in Form 16D by way of AR Registered Post to MK demanding the said sum failing which it said that CCB would apply for an order for sale of the said land. MK failed to comply with the said notice and CCB commenced proceedings for the sale of the land by way of public auction.

The issues for the Court were:

(a) whether CCB was entitled to apply for an order for the sale of the charged land as there was no demand made to D for repayment of the loan;

(b) whether the fact that the figures given by the Assistant General Manager, AGM, of CCB, in his first supplementary affidavit dated 5 August 1988 were inconsistent with those given by the receiver of CCB, resulted in the amount as demanded in the notice of demand and the statutory notice in Form 16D being inconclusive;

(c) whether the amount stated in the statutory notice in Form 16D was in excess of what was due to CCB;

(d) whether CCB was entitled to charge default interest since they had not given any notice pursuant to clause 5 of the charge annexure which provided that notice should be given before the default interest could be imposed.

Held:

[1] Under clause 1 of the charge annexure the chargor is required on demand to pay to CCB the outstanding amounts owed by D; therefore CCB could demand payment from MK without first demanding the said sum from D.

[2] The "existence of cause to the contrary under s. 256(3) of the National Land Code revolves around the validity or otherwise of the notice of demand sent by the solicitors of CCB on 9 January 1988 and the subsequent statutory notice in Form 16D sent on 19 January 1988.

[3] There is no general rule that in all cases a prior precise demand must be made prior to commencing an action, or that prior notice must be given in all cases, or that unless a precise amount owing is correctly stated in the notice, the notice will be invalidated.

[4] There is a clear distinction between an innocent erroneous sum specified in the notice of demand and a wrongful demand for payment of something to which the chargee is not entitled whether under the charge or under a statutory provision.

[5](a) It is clear from the affidavits made on behalf of CCB that the sum demanded by them comprised not only the capital sum and the normal or prescribed interest at 15% p.a. but was also inclusive of the normal interest and default interest at the rate of 20% p.a.;

(b) there is nothing to show that CCB had given the requisite notice as required under clause 5 in relation to default interest - otherwise CCB could have produced the same and in failing to deny, contradict or challenge the allegation made by MK, it must be held that the allegation is admitted;

(c) therefore the wrongful demand for payment of the default interest to which CCB is not entitled must necessarily render the notice of demand and the Form 16D ineffectual and invalid as this is a case where the said notices were demanding payment of something to which CCB has no right.

[Plaintiffs not entitled to remedies sought; matter to go to trial.]

Cases referred to:
Bunsbury Foods Pty. Ltd. v. National Bank of Australasia Ltd. [1983] 153 CLR 491
Clyde Properties Ltd. v. Tusker [1970] NZLR 754
Jaffe v. Premier Motors Ltd. [1960] NZLR 146
Keng Soon Finance v. M.K. Retnam Holdings Sdn. Bhd. & Ors. [1983] 2 MLJ 384; [1989] 1 MLJ 457; [1989] 1 CLJ (Rep) 1
Mok Hin Wah & Ors. v. United Malayan Banking Corporation Bhd. [1987] CLJ (Rep) 219
O'Clay v. Commercial Bank of Australia Ltd. [1933] 50 CLR 200
Public Bank Bhd. v. Chan Siok Lee & Ors. [1989] 2 MLJ 305
Tynte v. Buller [1854] 23 LJ Ch 504

Legislation referred to:
Civil Law Act 1956, s. 11
National Land Code 1965, ss. 254, 256(3)
Property Law Act 1952 [NZ], s. 92
Rules of the High Court 1980, O. 83 r. 2(3)

For the Plaintiff - Sivaloganathan; M/s. Siva, Thurai Mariany & Co.
For the Defendant - Tan Poh Meng; M/s. Nik Hussain & Partners

JUDGMENT

Lim Beng Choon J:

This is an application by the plaintiff bank for an order that the defendant company do show cause why the land held under Geran 30088 Lot No. 452 Mukim of Hulu Kelang, District of Gombak (hereinafter referred to as "the charged land") registered in the name of the defendant company and charged to the plaintiff bank should not be sold by public auction under the direction of this Court for the recovery of the sum RM15,477,187.99 only being principal, interest and other dues on the said charge as at 8 January 1988. In the supporting affidavit affirmed by the assistant general manager of the plaintiff bank on 2 March 1988 it was stated *inter alia* that the charge was executed by the defendant company in favour of the plaintiff bank to secure the repayment of monies up to the sum of RM12 million only advanced as secured loan to one Dato' Seri Mohd. Adib bin Mohd. Adam (hereinafter referred to as "the borrower") with interest at the rate of 15% per annum on monthly rests payable on demand. As at 8 January 1988 the borrower was indebted to the plaintiff bank in the sum of RM15,477,187.99 together with interest thereon at the rate of 15% per annum on monthly

rests. As from 9 January 1988 a default interest at the rate of 20% per annum was imposed by the plaintiff bank on the amount in excess of the approved limit till the date of realization. By letter dated 9 January 1988 the plaintiff bank through their solicitors notified the defendant company that the borrower had defaulted in repayment and demanded payment of the sum of RM15,477,189.99 with interest accrued thereon but the defendant company failed to settle the same or any part thereof within the stipulated period mentioned in the letter. Again by letter dated 19 January 1988 the plaintiff bank through their solicitors sent by A.R. registered post a statutory notice in Form 16D demanding the defendant company to pay the sum of RM15,477,189.99 within seven days of the service of the statutory notice failing which they would apply for a Court order for the sale of the charged land. The defendant company had failed to comply with the said notice.

On 5 August 1988, the assistant general manager (credit) of the plaintiff bank affirmed a supplementary affidavit (encl. 6) in which he gave particulars of the amount outstanding as at 10 August 1988. As the defence Counsel was relying on certain particulars appearing therein to contend that the plaintiff bank's claim was misconceived, it is appropriate to set out those particulars that were being challenged. The said particulars are as follows:

Particulars

(i) Amount of repayments Nil.

(ii) Outstanding sum from disbursement of loan to 3 March 1988, namely date of issue of originating summons (inclusive of interest at the rate of 15% per annum on monthly rests) RM15,336,809.17

(iii) Outstanding sum from disbursement of loan to 3 March 1988 namely date of issue of originating summons (inclusive of interest at the rate of 15% per annum and default interest at the rate of 20% per annum on monthly rests on the amount in excess of the loan limit of RM12,000,000) RM15,931,339.07

On 9 August 1988 the director of the defendant company affirmed an affidavit (encl. 7) alleging that:

(a) the plaintiff bank's claim was misconceived as the plaintiff bank had not established the sum said to be due from the borrowers;

(b) the claim was bad in law as the plaintiff bank charged interest upon interest at the rate of 20% p.a. which was contrary to s. 11 of the Civil Law Act 1956;

(c) there was no agreement to charge default interest and consequently the plaintiff bank's claim as framed in the proceeding was bad in law. Alternatively the plaintiff bank had not established their entitlement to such default interest.

Apparently to show that the outstanding accounts of the borrower had been correctly computed the assistant general manager of the plaintiff bank affirmed a second supplementary affidavit on 6 September 1988 (encl. 8). Annexed to the said affidavit in encl. 8 are two statements of account of the borrower as at 8 September 1988. The first statement of account (Exhibit 'SJ2' annexed to encl. 8) shows that the loan amount with normal interest and default interest was, as at 1 January 1988 RM15,406,369.74. The loan amount with normal interest and default interest as at 1 January 1988 was confirmed by the duly appointed receiver of the plaintiff bank by his supplementary affidavit affirmed on 28 June 1989 (see Exhibit 'HAK-1' and 'HAK-2' annexed to the said affidavit on encl. 11). In a second supplementary affidavit affirmed on 3 January 1990 (encl. 12) the said receiver averred *inter alia* that:

(a) the amount of the advance is - RM12,000,000

(b) the amount or repayment is - Nil.

(c) at the date of the issue of the originating summons the amount of interest in arrears:

(i) normal interest RM3,335,252.49

(ii) normal and default interest RM3,819,295.63

I shall pause here for a moment to make some observations. It is clear that the figures given by the assistant general manager of the plaintiff bank in his first supplementary affidavit affirmed on 5 August 1988 (encl. 6) are inconsistent with those given by the receiver of the plaintiff bank in his second supplementary affidavit affirmed on 3 January 1990 (encl. 12). While the assistant general manager averred that the outstanding sum as at the date of issue of the originating summons inclusive of normal interest stood at RM15,336,809.17 and the outstanding sum as at that date inclusive of normal and default interest stood at RM15,931,339,07, the said receiver gave the two figures as RM15,335,252.49 (RM12,000,000 plus RM3,335,252.49) and RM15,810,295.63 (RM12,000,000 plus RM3,810,295.63). The said receiver thereafter filed a third supplementary affidavit affirmed on 6 February 1990. By this affidavit he admitted that there was an inconsistency in the figure given by the said assistant general manager relating to the outstanding sum as at the date of issue of the originating summons inclusive of normal interest and the figure given by him. There is a difference of RM1,556.68. He said that the difference in amount arose "as the plaintiffs have of late been advised by their solicitors M/s. Siva, Thurai Mariany & Co. that in the computation of monies due on the loan disbursed, payments towards legal fees and payments towards valuers on valuation fees are not to be included." The said sum of RM1,556.68 had therefore been excluded by him in his computation of the loan sum as at the date of issue of the originating summons inclusive of normal interest. However no explanation had been given by him as regards to the inconsistency in the figure given by the said assistant general manager relating to the outstanding sum as at the date of issue of the originating summons inclusive of normal and default interest and that given by him for the same item. The difference in the amount (from my calculation) is RM121,043.44.

At the hearing of the plaintiff's application for an order for the sale of the charged land, the Counsel for the defendant company in his submission contended that firstly the plaintiff bank had failed to comply with the provisions of O. 83 r. 2 subrule (3) of the Rules of High Court in that they had failed to indorse on the outside fold of the copy of the affidavit served on the defendant company a notice informing the latter that the plaintiff bank intended at the hearing to apply for an order directing the defendant company to deliver up to the plaintiff bank possession of the charged property. This omission according to the Counsel is fatal particularly when the plaintiff bank is claiming for delivery of possession of the charged lands. Secondly Counsel said that as there was no demand made to the borrower for repayment of the loan the plaintiff bank was not entitled to apply to this Court for an order for the sale of the charged land. Thirdly he argued that as the figures given by the assistant general manager of the plaintiff bank in his first supplementary affidavit affirmed on 5 August 1988 were inconsistent with those given by the receiver of the plaintiff bank (as mentioned by me earlier), the amount as demanded in the notice of demand and the statutory notice in Form 16D was inconclusive. Fourthly he contended that the amount stated in the statutory notice in Form 16D was in excess of what was due to the plaintiff bank. Fifthly he said that the plaintiff bank was not entitled to charge default interest since they had not given any notice pursuant to clause 5 of the charge annexure which provided that notice should be given before the default interest could be imposed.

With a certain adroitness that appears to put an end to the first contention of the defence Counsel, the plaintiff's bank Counsel submitted that he was abandoning the prayer for possession of the property as the plaintiff bank could do so after the auction sale had been carried out. As regards to the inconsistency in the figures as contended by the defence Counsel, the plaintiff bank's Counsel submitted that there were two sets of figures, one set showing the outstanding sum inclusive of normal interest and another set showing the outstanding sum inclusive of normal and default interests. At any rate the inconsistency relating to the outstanding sum with normal interest which showed a difference of the sum of RM1,556.68 had been explained by the receiver of the plaintiff bank in his third affidavit. Counsel also stressed that in law it was not essential to the validity of the letter of demand or the statutory notice in Form 16D calling up the debt that it should correctly state the amount of the debt. He cited the case of *Public Bank Bhd. v. Chan Siok Lee & Ors.* [1989] 2 MLJ 305 and the case of *O'Clay v. Commercial Bank of Australia Ltd.* [1933] 50 CLR 200 to support his argument.

In dealing with the first contention of the defence Counsel namely that the plaintiff bank had failed to comply with O. 83 r. 2 subrule (3) of the Rules of High Court, I am of the view that as the plaintiff bank have abandoned their prayer for vacant possession of the charged land, the failure on the part of the plaintiff bank to comply with the said rule of the High Court is immaterial. As to the second contention namely that no demand was made to the borrower but only to the defendant company as chargor I am also of the view that it does not prevent the plaintiff bank from applying for an order for the sale of the charged land simply because under clause 1 of the charge annexure the chargor would on demand pay to the plaintiff bank "all sums of money which are now and shall from time to time or at any time hereinafter due or owing by the abovenamed Datuk Seri Mohd. Adib bin. Mohd. Adam." This statement indicates that the plaintiff bank could demand payment from the defendant company when the borrower had defaulted in making repayment of the loan sum and interest - see *Mok Hin Wah & Ors. v. United Malayan Banking Corporation Bhd.* [1987] CLJ (Rep) 219. As to the third, fourth and fifth contentions namely the inconclusiveness of the outstanding amount said to be due and payable by the defendant company there is much force in these contentions and they necessitate more attentive consideration. It is therefore advisable firstly to scrutinize the pertinent terms of the charge annexure and secondly to turn to the case law for guidance.

The charge annexure provides in clause 1 that

> The chargor will on demand pay to the bank all sums of money which are now or shall from time to time or any time hereinafter be due or owing by the abovenamed Datuk Seri Mohd Adib bin Mohd Adam (I.C. No. 1487837) of No. 63, Jalan Damai, Off Jalan Ampang, Kuala Lumpur (hereinafter called the "customer") solely or jointly with any other persons firms or companies and whether as principal or surety or which the customer may be or become liable to the bank anywhere on banking account or accounts current or otherwise or in any manner whatsoever including the balance for the time being owing.

and it continues to provide:

> If when the said account or accounts current or otherwise shall be closed either by demands as aforesaid or by the death of the chargor (or where the chargor shall be more than one person by the death of any of them) a balance shall be owing to the bank by the customer the chargor or the personal representatives of the chargor as the case may be will so long as the same or any part thereof shall remain owing pay to the bank interest thereon at the prescribed rate with monthly rests computed from the time when such balance shall have been ascertained and the chargor agrees that the statement of the manager assistant manager sub-manager accountant or any other officer of the bank as to the amount of such balance shall be final and conclusive.

Clause 2 provides that the notice of demand shall be in writing and signed by an authorized officer of the plaintiff bank or their solicitor or firm of solicitor purporting to act for them and the mode of service of the notice of demand. Clause 5 says that "any excess amount shall be subjected to the default charges at one and one third (1 - 1/3) times of the above interest rate and shall take effect from the date prescribed in the notice." Lastly clause 31 provides:

> In the event of any breach by the chargor of any of the agreements covenants terms stipulations and undertakings herein provided and on the part of the chargor to be observed and performed (including the agreement or covenant to pay the sum for the time being owing to the bank on demand as aforesaid) occurring and continuing for a period of not less than seven (7) days it shall be lawful for the bank forthwith to give notice to the chargor under s. 254 of the National Land Code requiring the chargor to remedy the said breach within a period of not less that seven (7) days and service of such notice shall be effected in the same manner as a notice demanding payment of the balance due as hereinbefore provided.

I shall now turn to the case law to seek some guidance. In *Keng Soon Finance v. M.K. Retnam Holdings Sdn. Bhd. & Ors.* [1983] 2 MLJ 384 our Federal Court had to construe *inter alia* the scope of s. 256(3) of the National Land Code which is as follows:

> (3) On any such application, the Court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the **existence of cause to the contrary**. (emphasis is mine).

In construing the words which I have emphasized the Federal Court said at p. 388 of the reported case:

> It is clear that notwithstanding the proof of default by a chargor the chargee is not automatically entitled to an order to sale nor would the Court without scrutiny allow his application. The Court must decide whether there are circumstances in the case before it which would amount to a "cause to the contrary" within the meaning of subs.(3) which would be sufficient in its opinion to refuse the chargee's application although the charge is lawfully and validly created and the chargor's default is proved.

Although the judgment of the Federal Court had been reversed when the matter went on appeal to the Privy Council nonetheless the construction which the Federal Court placed on the provisions of s. 256(3) had been acknowledged by the Privy Council. Thus Lord Oliver of Aylmerton, in his judgment on *Keng Soon Finance Bhd. v. M.K. Retnam Sdn. & Anor.* [1989] 1 CLJ (Rep) 1, said at p. 4:

> Section 256(3) of the National Land Code is mandatory. The Court 'shall' order a sale unless it is satisfied of the existence of "cause to the contrary". Granting that these words have been construed in Malaysia as justifying the withholding of an order where to make one would be contrary to some rule of law or equity, they clearly cannot extend to enabling the Court to refuse relief simply because it feels sorry for the borrower or because it regards the lender as arrogant, boorish or unmannerly.

The "existence of cause to the contrary" in the present case revolves around the validity or otherwise of the notice of demand sent by the solicitors of the plaintiff bank on 9 January 1988 and the subsequent statutory notice in Form 16D sent by the same solicitors on 19 January 1988. The attacks mounted by the defendant company against the validity of the said notice of demand and the statutory notice in Form 16D are basically that (i) the sum mentioned in both the notices exceeds the actual sum owed and payable by the borrower and (ii) the plaintiff bank has not established their entitlement to default interest.

In taking into consideration point (i) raised by the defendant company, the answer to their challenge can be found in *Bunsbury Foods Pty. Ltd. v. National Bank of Australasia Ltd.* [1983] 153 CLR 491. In that case Bunsbury Foods Pty. Ltd. granted a debenture to the National Bank of Australasia Ltd. to secure the repayment of money lent by the bank. By notice dated 5 April 1982 the bank demanded payment of the moneys then owing but the notice did not specify the amount owing. Three days later the bank handed to an officer of the company a letter giving details of the debt which overstated the amount owing. The company and its director thereupon contended that the notice was bad because it did not specify the amount payable and this omission was not cured by the subsequent letter which overstated the amount owing. In rejecting the contention the High Court of Australia said at p. 504:

> The foregoing examination supports the view that the interests of the parties will be more adequately protected by the principle that the debtor must be allowed a reasonable opportunity to comply with the demand before the creditor can enforce or realize the security than the adoption of the suggested proposition that the notice of demand must specify the amount of the debt. In determining whether the debtor has had such an opportunity it will be relevant to take account of the debtor's knowledge, lack of knowledge and means of knowledge of the amount due and of the information which the creditor has provided in that respect, including the response which he has made to any inquiry by the debtor.

The principle enunciated in that case has been applied by our Court. In *Public Bank Bhd. v. Chan Siok Lie & Ors.* [1989] 2 MLJ 305 Shankar J in applying the said principle said at p. 308:

> There is no general rule that in all cases, regardless of the terms of the document, a prior precise demand is a *sine quo non* to the commencing of an action. Nor is there any general rule that a prior notice must be given in all cases. The writ itself is a notice: see *Malayan Banking Bhd. v. Lim Ghee Leng*. Nor is there any general rule that in all cases, unless the precise amount owing is correctly stated in notice, the notice will be invalidated. The law indeed is otherwise.

I respectfully agree with the principle laid down in the two cases cited above. Applying the said principle to the present case, the contention (i) of the defendant company must be rejected. In arriving at this conclusion I am not saying that in no circumstances can a chargor challenge a notice of demand. He can certainly mount a challenge if he or the borrower (in the case of a third party charge) is in a position to pay off the sum demanded and wishes to know the exact and precise sum and he had communicated with the creditor and asked the creditor what sum he was required to pay. Nothing of this sort has happened in the present case; the defendant company merely ignored the two notices of demand.

With regard to defendant company's contention (ii) namely that the plaintiff bank is not entitled to claim for default interest, this issue stands on a different footing for if the plaintiff had in their notices of demand asked for something to which they were not entitled then the notice may well be ineffective and invalid. Turning to the authorities in this aspect of law, the first case which I would like to refer is *Jaffe v. Premier Motors Ltd.* [1960] NZLR 146. In that case the plaintiff, who was the mortgagor under memorandum of mortgage securing the sum of £27,618 advanced by the third defendant on the terms in the mortgage set out, sought an injunction restraining a sale through the Registrar of the Court of the property which was the security of the mortgage. The short point which the plaintiff's action was based was the allegation that the first defendant had failed to give a valid notice under s. 92 of the New Zealand Property Law Act 1952. That section, in effect, provided that no power to sell land conferred by any mortgage could become exercisable and no moneys secured by any mortgage

of land could become payable by reason of any default in payment of any moneys secured or in the performance of any covenant expressed or implied in the mortgage unless and until the mortgage served on the owner of the land a notice specifying the default complained of, the date on which the power would become exercisable or the moneys would become payable and requiring the owner to remedy the default and the owner failed to remedy the default before the date so specified. It was common ground that the plaintiff was at all material times in default of the stipulated weekly payments of interest. It was also indisputable that the principal moneys secured by the mortgage were repayable only much later than the date specified in the notice but clause 5 of the mortgage contained a provision to the effect that if the mortgage made default in any matters then the principal sum would, at the option of the mortgagee, became immediately payable without notice. The point in debate was that if the mortgagor failed to remedy his defaults in the payment of the interest before the notice expired would the principal sum become payable pursuant to clause 5 of the mortgage? The Supreme Court of New Zealand held that it was not and said at p. 147:

> As upon the construction and effect which I have given to s. 92 of the Property Law Act and clause 5 of the mortgage, the principal moneys secured by the mortgage were not payable unless the plaintiff failed to remedy the breaches of covenant within the date fixed by the notice. It follows that the plaintiff was not required in law to pay the principal sum in order to remedy the defaults complained of. In the result, the notice given was one which not merely required the mortgagor to remedy the defaults, but required him to repay the principal as well.

Accordingly the Supreme Court of New Zealand held that the first defendant had not given a valid and effectual notice under s. 92 and that the mortgagee was not entitled to exercise his power of sale because:

> In a case such as the present, in which the very purpose of s. 92 is to ensure that a mortgagor will have an opportunity of escaping the calling up of the principal sum and that he will receive a notice that will give him that opportunity, a notice which demands payments of the principal sum denies the mortgagor the very privilege the section was intended to give. Such a notice is not merely a notice which demands an excessive sum. It is a notice which defeats the very purpose for which the section requires it to be given. Such a notice cannot, in my view, be a valid and effectual notice under s. 92. (*ibid* p. 148).

The *ratio decidendi* in the *Jaffe* case is lucidly explained by Richmont J in *Clyde Properties Ltd. v. Tusker* [1970] NZLR 754 at p. 757 where the learned Judge after citing the aforementioned passage in the judgment of the *Jaffe* case went on to say:

> There is, to my mind, a very important difference between the notice with which Shorland J was concerned and the notice with which I am concerned in the present case. In the present case there is no dispute that the principal moneys had, in fact, fallen due under the mortgage. The notice described them as being greater by £500 than they in fact were. In *Jaffe's* case the notice treated the principal moneys as having become due whereas, in fact, the effect of s. 92 was to override the provisions of the mortgage document and to prevent the principal moneys becoming due by virtue of a breach of covenant during the currency of the mortgage unless and until notice in respect of such breaches of covenant was given and the breaches were not remedied before the date specified in the notice.

From the propositions advocated in the two cases mentioned above, there is a clear distinction between an innocent erroneous sum specified in the notice of demand and a wrongful demand for payment of something to which the chargee is not entitled whether under the charge or under a statutory provision.

Now in the present case, it may be recalled that in the two notices of demand the amount which the defendant company was required to pay as at 8 January 1988 was for the sum of RM15,477,189.99 together with interest accrued thereon. In the Form 16D the plaintiff bank elaborated the amount to be paid in this manner:

> and the amount outstanding in the account of the borrower as at 8 January 1988 is RM15,477,187.99 ... together with interest thereon at the rate of 15% per annum on monthly rest with default interest at the rate of 20% per annum on monthly rest on the amount in excess of the approved limit of RM12,000,000 from 9 January 1988 to date of full realization and is payable on demand.

It is manifestly clear from the affidavits of the plaintiff bank that the sum demanded by them comprised not only of the capital sum and the normal or prescribed interest at 15% per annum but also inclusive of the normal interest **and** default interest at the rate of 20% per annum.

This proposition is supported by the first supplementary affidavit affirmed by the assistant general manager of the plaintiff bank (encl. 6) where he gave particulars firstly of the outstanding sum "from the disbursement of loan to 3 March 1988 *viz* the date of originating summons (inclusive of interest at the rate of 15% per annum on monthly rests) as RM15,336,809.17." On the other hand the outstanding sum "from disbursement of loan to 3 March 1988 namely, date of issue of originating summons (inclusive of interest at the rate of 15% per annum and default interest at the rate of 20% per annum on monthly rests on the amount in excess of the loan limit of RM12,000,000 as RM15,931,339.07." Bearing in mind that the defendant company had never made any repayment towards the loan from the date of disbursement, the sum of RM15,477,187.89 demanded in the notice of demand and in Form 16D cannot be equated with the outstanding sum comprising of the loan and the normal interest but rather with the outstanding sum comprising of the loan and the normal interest as well as the default interest. Further support of the said proposition can be found from the second supplementary affidavit affirmed by the said assistant general manager (encl. 8) where it was stated that the opening balance of the loan account with normal interest as at 1 January 1988 was RM14,945,578.98 while the opening balance of the loan account with the normal interest and default interest as at that day was RM15,406,369.74. The figure of RM15,477,187.99 as mentioned in both the notices of demand must therefore reflect the balance of the loan account with normal and default interest. In short the sum demanded by the plaintiff company in their notices of demand must have included the element of default interest. Now clause 5 of the charge annexure required a notice to be served before any default interest could be imposed and there is no evidence to show that such notice had in fact been given either to the borrower or the defendant company, as chargor. Indeed when the defence Counsel in his submission suggested that there was no evidence to show that such a notice had been given, the plaintiff's Counsel said that the plaintiff bank would abandon the prayer for default interest and the issue of lack of notice should go for trial. The Court could grant an order in terms of the remaining prayers in the originating summons. With due respect I cannot agree with the suggestion of the plaintiff's Counsel. From the evidence before me there is clearly nothing to show that the plaintiff bank had given the requisite notice for if it were otherwise they could have easily produced the same particularly when they were fully aware that the defendant company had in their affidavit averred that "the plaintiff has not established their entitlement to default interest." In failing to deny, contradict or challenge the allegation made by the defendant company it must be held that the allegation is admitted - see *Tynte v. Buller* [1854] 23 LJ Ch 504. Under the circumstances I am impelled to hold that the wrongful demand for payment of the default interest to which the plaintiff bank is not entitled must necessarily render the notice of demand and the Form

16D ineffectual and invalid. It is not a simple case of the said notices of demand containing an erroneous sum but it is a case where the said notices were demanding payment of something to which the plaintiff bank had no right to.

In the circumstances of this case I am satisfied that the plaintiff bank are not *prima facie* entitled to the remedies sought by them in their originating summons. The matter must go for trial. Costs of this proceeding are to be paid by the plaintiff bank to the defendant company.

Also found at [1991] 2 CLJ 1144